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8 MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY
9

10 MONTANANS FOR JUSTICE: VOTE
11 NO ON CI-98, NOT IN MONTANA:
12 CITIZENS AGAINST CI-97 AND
13 PROPERTY OWNERS AGAINST
I-154, Political Ballot Committees,

14 Plaintiffs,

15 v.

16 STATE OF MONTANA, by and through
BRAD JOHNSON, in his capacity as
17 Secretary of State; MONTANANS IN
ACTION, a Montana Corporation,
18 CITIZENS RIGHT TO RECALL
MONTANA, PROTECT OUR HOMES
19 MONTANA, STOP OVER SPENDING
MONTANA, Political Ballot
20 Committees; and TREVIS BUTCHER,

21 Defendants.

Cause No. CDV-06-1162

**STATE'S RESPONSE TO
MOTION FOR EXPEDITED
HEARING AND OTHER RELIEF**

22 With its Answer filed today, the State of Montana hereby responds to
23 Plaintiffs' Complaint and Motion for an Expedited Hearing and Other Relief.

24 **BACKGROUND**

25 The Secretary of State is the statewide elected official responsible for
26 certifying qualified ballot issues for the election ballot, but he only plays a part in
27 the larger statutory system of submission and processing of petitions. Signature

1 gatherers throughout the state circulated petition forms approved by the Secretary of
2 State and the Attorney General. Mont. Code Ann. § 13-27-202. Each set of signed
3 petitions was accompanied by an affidavit by a person who “gathered or assisted in
4 gathering the signatures on the petition to which this affidavit is attached.” Mont.
5 Code Ann. § 13-27-302. Every signature gatherer was required to attest:

6 I believe the signatures on the petition are genuine, are the signatures
7 of the persons whose names they purport to be, and are the signatures
8 of Montana electors who are registered at the address or have the
telephone number following the person’s signature, and that the
signers knew the contents of the petition before signing the petition.

9 Id. Knowingly falsifying an affidavit is a misdemeanor subject to a \$500 fine or six
10 months imprisonment, or both. Mont. Code Ann. §§ 13-27-106 & 45-7-203.

11 Signed petitions were submitted to the county election administrators at least
12 four weeks before they were due to the Secretary of State (June 23, 2006), and until
13 then any person could have withdrawn his name from the petitions. Mont. Code
14 Ann. § 13-27-301. Within four weeks of receiving signed petitions, the county
15 election administrators verified that all signers are registered electors of the county,
16 and that randomly selected signatures on each petition are genuine. Mont. Code
17 Ann. § 13-27-303(1). For all petitions that appeared to contain genuine signatures,
18 a county election administrator certified the total number of valid signatures and
19 forwarded the petitions to the Secretary of State in batches containing petitions from
20 several gatherers. Mont. Code Ann. § 13-27-304; (Miller Aff ¶ 6). Any time before
21 the petitions were forwarded to the Secretary of State, a registered voter could have
22 challenged signatures in a county, and required the county election administrator to
23 verify all signatures on a challenged petition. Mont. Code Ann. § 13-27-306. If a
24 fraudulent or duplicate signature was discovered at any time, the election
25 administrator could have submitted the name of the signer and the signature
26 gatherer to the county attorney. Mont. Code Ann. § 13-27-303.

The Secretary of State received the petitions from the county election administrators by July 21. Mont. Code Ann. § 13-27-104. Only signatures on petitions notarized or certified by county election administrators were tabulated, unless the petitions did not meet statutory requirements. Mont. Code Ann. § 13-27-307. However, any petitions with “[c]lerical or technical errors that do not interfere with the ability to judge the sufficiency of signatures on the petition do not render a petition void,” and therefore were included in the total tally. Mont. Code Ann. § 13-27-201. If one petition contained such an error, the entire batch containing that petition was set aside and counted as defective, even if the majority of the petitions in the batch had no errors. (Miller Aff. ¶ 10.) As soon as petitions containing a sufficient number of signatures were filed with the Secretary of State, he “immediately certif[ied] to the governor that the completed petition has been officially filed.” Mont. Code Ann. § 13-27-308. Valid signatures that the Secretary of State received after a petition has been certified for the ballot were tallied for a total signature count, but not counted toward certification; these surplus signatures provide a margin of error in the event any signatures are invalid. The certifications and final tallies of the ballot issues Plaintiffs challenge are as follows (Miller Aff.):

Title	Certified Tally (date certified)	Final Tally (July 21, 2006)	Tally w/ errors* (July 21, 2006)	King Signatures** (valid & invalid)
CI-97	47,905 signatures, 55 districts (July 21, 2006)	48,016 signatures, 55 districts (+3,401 margin)	52,084 signatures, 60 districts (+7,469 margin)	16,149
CI-98	49,956 signatures, 60 districts (July 21, 2006)	50,097 signatures, 60 districts (+5,482 margin)	51,706 signatures, 60 districts (+7,091 margin)	14,731
I-154	27,748 signatures, 54 districts (July 20, 2006)	35,871 signatures, 71 districts (+13,563 margin)	36,604 signatures, 72 districts (+14,296 margin)	9,574

* Clerical or technical errors include omissions of: printed names (by county staff, notaries, or signature gatherers), seals or signatures (by county staff or notaries), county or address (by notaries or signature gatherers), or date of first signatures (by signature gatherers). See Mont. Code Ann. § 13-27-201; (Miller Aff. ¶ 8). Also included in the technical errors were 62 total signatures gathered by Robert Colby, who has testified he used an incorrect address on his petition affidavits; another 6 signatures gathered by Mr. Colby were included in the Final Tally. (Miller Aff. ¶ 17.)

** Gross number of signatures submitted by Marvin King contained in certified petitions, without discounting for invalid signatures. ***Due to the inclusion of invalid signatures, these figures overstate the number of King signatures counted toward certification.*** (Miller Aff. ¶ 16.)

1 As the statutory qualification process indicates, there are multiple levels of
2 review and multiple opportunities for voters to bring forth fraud allegations.
3 Plaintiffs' Complaint in this Court represents the last clear chance in the process to
4 remedy potential fraud, and the window of opportunity for review is narrow. On
5 August 24, the Secretary of State certified ballots containing all three ballot issues
6 to county election administrators, and the counties began to prepare and print the
7 ballots. Mont. Code Ann. § 13-12-201. Ballot printing may take between two to
8 three weeks. Absentee and military ballots must be sent out no later than
9 September 22. Mont. Code Ann. § 13-1-104(1). Once the general election is held,
10 "[t]he sufficiency of the initiative petition shall not be questioned" and Plaintiffs'
11 claims become moot by either the approval or rejection of each ballot issue by the
12 general electorate. Mont. Const. art. III, § 4(3).

13 14 **ARGUMENT**

15 This action raises serious allegations of fraud in the petition process for three
16 statewide initiatives due to be voted upon in the general election. But these
17 allegations do not lie against the Secretary of State. Nor does the State take a
18 position on whether the allegations are true. While the Secretary has made all
19 reasonable efforts under the law to detect and reject illegal signatures in his
20 tabulation, only this Court can consider, and remedy if necessary, Plaintiffs' factual
21 claims of pervasive fraud in the petition process.

22 Plaintiffs bring their action pursuant to the original jurisdiction conferred
23 upon this Court to hear "a contest of a ballot issue" for "violation of the law relating
24 to qualifications for inclusion on the ballot" or "illegal petition signatures or an
25 erroneous or fraudulent count or canvass of petition signatures." Mont. Code Ann.
26 § 3-5-302(6); Compl. at ¶ 6. They state three claims for relief: (1) all signatures
27 obtained by professional signature gatherers should be discarded because of a

1 “pervasive pattern of illegal and deceptive practices” (Compl. at ¶ 26); (2) all
2 signatures gathered by Marvin King should be discarded because of his “failure . . .
3 to follow the proper certification process” (Compl. at ¶ 27); and (3) “all signatures
4 submitted by gatherers giving false addresses should be discarded” (Compl. at
5 ¶ 28).

6 The State urges this Court to consider Plaintiffs’ claims carefully and
7 quickly. Carefully, because in addition to the dangers posed by actual fraud in
8 petition gathering, there is the converse threat that an improper remedy could
9 disenfranchise innocent petition signers. Quickly, because counties already have
10 begun to print their ballots, and must send out tens of thousands of absentee ballots
11 in less than a month. While it takes no position on the fraud allegations before the
12 court, the State offers this brief to clarify the legal and factual issues raised.

13
14 **I. THE LEGAL BASIS FOR PRE-ELECTION INVALIDATION OF**
15 **INITIATIVE PETITION SIGNATURES UNDER MONTANA LAW.**

16 The regulation of ballot processes involves two weighty but countervailing
17 interests. As one court has put it:

18 Any sensible laws regulating the time, place and manner of voting in a
19 democracy ought to focus on two goals: maximizing the participation
20 of eligible voters and eliminating fraud. However, these goals often
21 are in tension, since regulations that guard against fraud may also
22 raise barriers so high that some eligible voters may not be able to
pass. Similarly, relaxing the rules that protect against voting more
than once in a single election and verify eligibility may increase the
possibility of fraud.

23 Bay County Democratic Party v. Land, 347 F. Supp. 2d 404, 411 (E.D. Mich.
24 2004). In the context of ballot issue petitions, the Supreme Court has spoken more
25 directly:

26 Petition circulation . . . is core political speech, because it involves
27 interactive communication concerning political change. First
Amendment protection for such interaction . . . is at its zenith. We

1 have also recognized, however, that there must be a substantial
2 regulation of elections if they are to be fair and honest and if some
3 sort of order, rather than chaos, is to accompany the democratic
processes.

4 Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 186-87 (1999) (citations
5 and quotations omitted).

6 Montana law strikes this balance with an election code that, on the one hand,
7 presumes the validity of signatures determined to be genuine notwithstanding
8 technical defects in the petitions, Mont. Code Ann. § 13-27-201, and on the other,
9 allows the contest of “illegal petition signatures” at any time before the election,
10 Mont. Code Ann. § 3-5-302. This reflects a judgment that fraud must be rooted out,
11 but not at the cost of invalidating legitimate signatures simply because a petition
12 gatherer blundered. In other words, absent fraud or forgery in the signing of the
13 petition, the sin of the gatherer should not be visited on the signer.

14 **A. Defrauding of Signers Invalidates Signatures.**

15 The most egregious conduct Plaintiffs allege, if proved, would require the
16 invalidation of any signatures obtained thereby. For example, the “bait-and-switch”
17 tactic, in which gatherers allegedly obtained signatures on all three initiative
18 petitions by misrepresenting them as “copies” of the first petition signed, clearly
19 would be grounds for invalidation. (Compl. at ¶¶ 18; Pls’ Br. Exs. 2-5.) However,
20 gatherers’ use of arguments “that were calculated to inflame passions and
21 manufacture a need” for the initiative (Compl. at ¶¶ 22) would not support
22 invalidation, to the extent that such arguments are “core political speech” protected
23 by the First Amendment:

24 The circulation of an initiative petition of necessity involves both the
25 expression of a desire for political change and a discussion of the
26 merits of the proposed change. Although a petition circulator may not
27 have to persuade potential signatories that a particular proposal should
prevail to capture their signatures, he or she will at least have to
persuade them that the matter is one deserving of the public scrutiny
and debate that would attend its consideration by the whole electorate.

1 This will in almost every case involve an explanation of the nature of
2 the proposal and why its advocates support it.

3 Meyer v. Grant, 486 U.S. 414, 421-22 (1988) (footnote omitted); see also Citizens
4 Comm. for the D.C. Video Lottery Terminal Initiative v. District of Columbia Bd.
5 of Elections & Ethics, 860 A.2d 813, 814 (D.C. 2004) (Citizens Committee) (noting
6 “significant First Amendment concerns . . . regarding the Board’s exclusion of
7 signatures based on ‘false advertising,’” and declining to rely on those grounds to
8 invalidate signatures).

9 Similarly, Plaintiffs’ claim for the blanket invalidation of “all signatures
10 obtained by professional signature gatherers” is overbroad. (Compl. at ¶ 26.) Any
11 proven fraud by particular individuals or groups of paid signature gatherers should
12 be remedied, if necessary, by invalidation of signatures. See Citizens Committee,
13 860 A.2d at 817 (invalidating signatures collected by professional signature
14 gatherer organization when 83% of gatherers from that organization who testified
15 admitted to illegal signatures). But the mere “payment of petition circulators,”
16 without more, is protected First Amendment expression. See Meyer, 486 U.S. at
17 428. Moreover, “[f]raud or guilty knowledge will not be imputed to the circulator,
18 but must be affirmatively established.” In re Initiative Petition No. 272, 388 P.2d
19 290, 293 (Okla. 1963); see also In re Bower, 242 N.E.2d 252, 258 (Ill. 1968) (“We
20 do not believe that such fraud was shown on the part of the two circulators who
21 were called to testify as to justify striking the signatures procured by all 43
22 circulators; the trial court therefore acted correctly in refusing to strike all of the
23 signatures on the recall petitions because of isolated instances of proof that certain
24 signatures were improper”).

25 **B. Technical Defects Do Not Invalidate Signatures.**

26 It is important to distinguish between actual fraud in the inducement of
27 petition signatures and “[c]lerical or technical errors that do not interfere with the

1 ability to judge the sufficiency of signatures on the petition” that “do not render a
2 petition void.” Mont. Code Ann. § 13-27-201. This distinction is particularly
3 critical here, where there is no allegation of forged signatures and the Secretary of
4 State tallied a sufficient number of certified genuine signatures lacking technical
5 defects to qualify each initiative at issue. See State ex rel. Freeze v. Taylor,
6 90 Mont. 439, 447 (1931) (rejecting challenge to petitions based on omission of
7 voter addresses where “[t]here is not any allegation . . . that the signatures appearing
8 in the petition were not the genuine signatures of the electors.”).

9 For example, the allegations concerning gatherer Robert Colby, who has
10 admitted to using a false address in his Montana affidavits (Pls’ Br. Ex. 1) but
11 submitted only 68 signatures for all three initiatives (Miller Aff. ¶ 17), would be
12 insufficient to decertify the ballot issues given the apparent authenticity of the
13 underlying signatures and the few he submitted. See United Labor Committee v.
14 Kirkpatrick, 572 S.W.2d 449, 454 (Mo. 1978) (“The only statutory purpose in
15 having a notary sign the petition to begin with is to provide a double check on the
16 validity of the signatures of the voters. If the validity of the voters’ signatures can
17 be otherwise verified, their signatures should not be invalidated by the notary’s
18 negligence or deliberate misconduct.”). Absent any reliance by petition signers on
19 the gatherer’s residency, a falsified address does not render a petition void. See
20 Nelson v. Keisling, 964 P.2d 284, 290 (Or. Ct. App. 1998) (rejecting claim for
21 invalidation of signatures due to false verification of gatherer’s residency, when
22 “there is neither evidence nor argument as to who relied on the fact that individuals
23 collecting initiative petition signatures falsely represented themselves to be
24 registered Oregon voters or as to how anyone was injured as a result.”); cf.
25 McCarney v. Meier, 286 N.W.2d 780, 786 (N.D. 1979) (voter address requirements
26 “should not work to the disadvantage of the qualified electors who signed the
27 petition and expected their signatures to be counted.”).

1 The allegations concerning Marvin King are more difficult to assess by this
2 “technical error” standard. While it appears he was an impossibly prodigious
3 signature gatherer, the law actually required him only to attest that he “gathered or
4 assisted in gathering the signatures on the petition to which this affidavit is attached
5 on the stated dates.” Mont. Code Ann. § 13-27-302. In this respect, Montana law
6 has a relatively lax standard for gatherer certification, where other states require the
7 affiant to be in the presence of the signer. Compare id. with D.C. Code
8 § 1-1001.16(h)(3) (circulator must attest that he “was in the presence of each person
9 when the appended signature was written”); Or. Rev. Stat. § 249.740(4) (“The
10 circulator shall certify on each signature sheet that the individuals signed the sheet
11 in the presence of the circulator”). Thus, unlike the “false signing” violations of the
12 D.C. presence requirement proved in Citizens Committee, 860 A.2d at 814,
13 Montana law suggests that it is not illegal in itself for a gatherer to assist in the
14 collection of signatures outside of his presence.

15 Additionally, the “gross” total number of signatures Mr. King submitted
16 significantly overstates the actual “net” number of valid signatures that were
17 certified. Due to the “batching” of signature certifications at the county level, it is
18 difficult to ascertain how many signatures certified as valid by counties (and
19 therefore counted toward certification by the Secretary of State) actually are
20 attributable to Mr. King. (Miller Aff. ¶ 16.) Plaintiffs apparently have not
21 accounted for these invalid signatures, and in the event one or more signature
22 gatherers’ petitions are invalidated the Court should ensure against
23 “over-invalidating” signatures that did not count toward certification in the first
24 place.

1 **II. PLAINTIFFS' REMEDY WILL BECOME IMPRACTICABLE OR**
2 **MOOT IN A MATTER OF WEEKS.**

3 Although "[a] contest of a ballot issue . . . may be brought at any time after
4 discovery of illegal petition signatures or an erroneous or fraudulent count or
5 canvass of petition signatures," Mont. Code Ann. § 3-5-202(6)(b), legal and
6 practical factors limit the time available for effective relief.

7 **A. There Is No Basis for Dual Ballot Certification.**

8 Plaintiffs' demand that the Secretary of State certify to the counties two
9 ballots, one with and one without the ballot initiatives at issue, is futile. Factually,
10 there is no reason to think that just two ballots would be enough, since there are
11 eight possible ballot combinations depending on which of the three initiatives
12 remain certified, and scores of separate ballot forms for each locality. Legally, on
13 the day the State was served with Plaintiffs' motion, the Secretary of State already
14 had certified all three initiatives pursuant to the deadline provided in Mont. Code
15 Ann. § 13-12-201.

16 More importantly, Counties already have gone to press with their ballots, and
17 incurred considerable printing expenses to do so. Once the ballots have been
18 printed two to three weeks from now, there will remain a small window of time
19 before absentee ballots must be sent out on September 22. Any final legal
20 resolution of Plaintiffs' claims after that window closes runs the risk of absentee
21 and military voters being presented with and voting on ballot issues that are dead
22 letters. Later, the only practicable remedy would be not to count the votes on any
23 decertified initiative.

1 **B. The Sufficiency of the Petition May Not Be Questioned After the**
2 **Election is Held.**

3 The Montana Constitution provides that “[t]he sufficiency of the initiative
4 petition shall not be questioned after the election is held.” Mont. Const. art. III,
5 § 4(3). This provision was proposed in 1972 by Delegate Joyce, who as an assistant
6 attorney general had defended an initiative after its enactment against challenges
7 “that the petitions that had been circulated in the various counties were insufficient,
8 that some of the names were forgeries, and that sort of thing.” Const. Con. Verb.
9 Tr. at 2698. Therefore he offered the amendment to “make it perfectly clear in the
10 future that once the election is held, why, you can’t challenge the sufficiency of the
11 petitions.” Id. at 2699.

12 With its adoption, the provision simply confirms the principle that the
13 Supreme Court had applied in Delegate Joyce’s case: “after the people have voted
14 on the measure and a great majority of the voters throughout the state have
15 expressed their approval, the courts presume that the public interest was there and
16 technical objections to the petition or its sufficiency are disregarded.” State ex rel.
17 Graham v. Board of Examiners, 125 Mont. 419, 427-28, 239 P.2d 283, 289 (1951);
18 see also Martin v. State Highway Comm’n, 107 Mont. 603, 614-15, 88 P.2d 41, 47
19 (1939) (“[I]t is a rule of well-nigh uniform recognition that after an election has
20 been held, a party will not be permitted to challenge it unless he can show that a
21 different result would have been reached but for the conditions of which he
22 complains”), quoting Potter v. Furnish, 46 Mont. 391, 394, 128 P. 542, 543 (1912).

1 **CONCLUSION**

2 Resolution of Plaintiffs' claims will require careful and quick examination of
3 the facts presented on both sides. The State does not take a position on what those
4 facts will show. However, based on its consideration of Montana law the State
5 would concentrate the Court's attention on the single issue that may require
6 invalidation of signatures and, possibly, decertification of one or more ballot issues:
7 the fraudulent inducement of petition signatures.

8 Respectfully submitted this 29th day of August, 2006.

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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that I caused a true and accurate copy of the foregoing State's
18 Response to Motion for Expedited Hearing and Other Relief to be mailed to:

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